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90-616

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRED RICE,

Petitioner,

vs.

JOHN AURIEMMA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether a public official is entitled to qualified immunity for employment decisions that, objectively, did not violate then clearly established affirmative action law, where the official denies that he had any racial motivation—affirmative or negative—in undertaking the challenged actions.

Whether dictum can clearly establish law for qualified immunity purposes.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Fred Rice, the former Superintendent of the Chicago Police Department, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, entered in the above-entitled proceeding on August 20, 1990.

[1] Initially there were eighteen plaintiffs. The sixteen who remain and are respondents to this petition are: John Auriemma, Daniel Coll, Marshall Consadine, Renaldo Cozzi, Kenneth Curin, Russell Ditusa, Thomas Farogoi, John Hinchy, Kathryn Kajari, George Marcin, Patrick McDonough, John Rafter, Dominic Rizzi, James Stampnick, Thomas Walton and Roger Whalen.

OPINIONS BELOW

The opinions of the majority and dissent of the panel of the United States Court of Appeals for the Seventh Circuit are reported at 895 F.2d 338 and are reprinted in the separate appendix at pp. A.1-A.28. The *en banc* opinion of the Seventh Circuit, together with three dissenting opinions, are reported at 910 F.2d 1449 and are reprinted in the separate appendix at pp. C.1-C.32.

The minute orders announcing the decisions of the United States District Court for the Northern District of Illinois (Holderman, J.) denying petitioner's motions for summary judgment and for reconsideration are not reported. They are reprinted, together with the relevant portions of transcribed proceedings where the judge announced his decisions and reasoning, in the separate appendix at pp. D.1-D.11 and E.1-E.7.

JURISDICTION

The respondents brought this suit in the Northern District of Illinois under 42 U.S.C. §§ 1981, 1983 and 1985(3). The district court's jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343.

Petitioner filed a motion for summary judgment, asserting that he was entitled to qualified immunity on all counts of the Second Amended Complaint. On March 6, 1989, the district court entered an order granting petitioner's motion in part and denying it in part. Petitioner

immediately filed a motion to reconsider, which the district court denied on March 7, 1989.

Petitioner took an interlocutory appeal from the denial of qualified immunity pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). The United States Court of Appeals for the Seventh Circuit had jurisdiction of the appeal under 28 U.S.C. § 1291. A panel of the Seventh Circuit heard the case and issued an opinion on February 6, 1990. Respondents sought and were granted a rehearing of the case and the Seventh Circuit, sitting *en banc*, after rehearing issued its opinion and judgment on August 20, 1990. No rehearing of that judgment was sought.

STATEMENT OF THE CASE

This is a civil rights action brought by sixteen white police supervisors in the Chicago Police Department who claim they were demoted because of their race in violation of the equal protection clause and 42 U.S.C. §§ 1981, 1983 and 1985(3). Four of these officers also claim that petitioner retaliated against them for filing this lawsuit, in violation of the first amendment and 42 U.S.C. § 1983. Petitioner Fred Rice was the Superintendent of the Chicago Police Department and made the personnel decisions about which respondents complain.

Petitioner was appointed Superintendent of the Chicago Police Department in August, 1983. R. Doc. 103 at par. 2. As his predecessors in office had done, shortly after assuming the position of Superintendent, petitioner reorganized the top management ranks of the department. R. Doc. 105, Beazley Affidavit.

As part of his reorganization, Rice demoted twenty-six white officers, including all of the respondents, from the top management ("exempt rank") positions they had held for varying periods of time. R. Doc. 50 at Count III, pars. 23-41, 50-51; R. Doc. 105, Holton Affidavit. The exempt rank officers are the highest level managers of the department, making and executing police policy in the supervision and direction of over 15,000 police employees. R. Doc. 105, Holton Affidavit. No black officers in the exempt ranks were demoted, but one Hispanic officer was, and six positions were eliminated. R. Doc. 105, Beazley Affidavit. At the same time, Rice announced twenty-one promotions of new officers into the exempt ranks. Of those, nine were white, nine were black and three were Hispanic. *Id.* Rice also promoted four black officers who were already in the exempt ranks to higher positions. Prior to the reorganization, the exempt ranks of the Chicago Police Department were 83% white, 13% black, and 4% Hispanic, whereas the total department work force was 69% white, 27% black, and 4% Hispanic. R. Doc. 125. After the reorganization, the exempt ranks were 71% white, 24% black and 4% Hispanic. R. Doc. 105, Beazley Affidavit.

Respondents alleged in their complaint that the demotions of white officers were done pursuant to a plan to "demote white Chicago police officers who held supervisory command positions and to make these positions available to black officers." R. Doc. 50 at Count III, par. 57. Some of the respondents further claimed that because of "the filing of the original complaint in this action, plaintiffs have been subjected to a pattern of harassment and retaliatory treatment by defendant[ ] Rice." R. Doc. 50 at Count V, pars. 65 and 73. Petitioner denied that he made his personnel decisions based on race. R. Doc. 122 at p. 12.

After extensive discovery, petitioner and other defendants moved for summary judgment, claiming that respondents had failed to raise a material issue of fact about whether Rice was racially motivated in his decisions. R. Doc. 57. In opposing the motion for summary judgment, respondents relied upon four factual assertions: (1) that Rice referred to the racial composition of the exempt ranks and that of the total police department in a meeting with Michael Holewinski, Mayor Washington's liaison to the police department, in December 1983, R. Doc. 73 at par. 66, incorporated by reference in R. Doc. 122 at n.1; (2) that in determining his December 1983 personnel changes, Rice utilized a chart which contains a notation referring to the race of the officers, R. Doc. 73 at par. 65; (3) that during respondent McDonough's demotion interview, Rice told him that he had done a good job, "but it's the numbers game," *id.* at par. 89; and (4) that in November, 1983, Ed Bishop, who was shortly thereafter promoted to be Rice's executive assistant, told one of the officers being demoted that Rice had already "talked with" City Hall, and that it was Bishop's position that Rice could do what he wanted to remove whites and replace them with blacks because of past discrimination in the police department, R. Doc. 69, p. 37. The district court denied defendants' motion. R. Docs. 79, 80.

Subsequently, petitioner moved again for summary judgment, this time on the basis of qualified immunity. That motion was also denied in relevant part, see separate Appendix at D.1. Petitioner's motion for reconsideration was also denied, see separate Appendix at E.1. In an opinion issued on February 6, 1990, a majority of a panel of the Seventh Circuit reversed, holding that petitioner was entitled to qualified immunity on the race claims since his conduct could reasonably be justified under then-existing

affirmative action law, and to judgment on the retaliation claims, since respondents were "solely interested in advancing their own private employment interests," not in raising "an issue of public concern," and thus had failed to state a constitutional claim. App. at A.19, A.20.

The court granted respondents' request for rehearing and reheard the case *en banc* on May 30, 1990. The full court issued its judgment and opinion in favor of respondents on all issues relevant to this petition on August 20, 1990. The majority held that petitioner was not entitled to qualified immunity on either the race or retaliation claims. On the race claim, the majority reasoned that since Rice had denied utilizing any affirmative action rationale when he demoted respondents, he was not entitled to qualified immunity based on the unsettled state of affirmative action law at the time. See App., C.8-C.15. On the retaliation claim, the majority affirmed the district court in its holding that when the Seventh Circuit in an earlier case held that the filing of a lawsuit that did not implicate matters of public concern was unprotected by the first amendment, it "clearly established" the obverse: that the filing of suits that do raise matters of public concern is protected. Because, in the majority's view, this action did raise issues of public concern, the majority denied petitioner qualified immunity. See App. C.18-C.21. Four judges dissented in three separate opinions. See App. C.22-C.32.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S FAILURE TO GRANT PETITIONER QUALIFIED IMMUNITY MAKES THAT DEFENSE LARGELY UNAVAILABLE TO PUBLIC OFFICIALS ACCUSED OF CONSTITUTIONAL VIOLATIONS WHERE INTENT IS AN ELEMENT OF THE OFFENSE, EVEN WHERE THE OFFICIAL'S CONDUCT IS, AS HERE, OBJECTIVELY REASONABLE UNDER EXISTING LAW.

1. The Issue Presented By This Case Is Unresolved And Arises Frequently In The Federal Courts.

This case presents an important issue of federal law which arises frequently in civil rights litigation: whether a public official is entitled to qualified immunity at or before the summary judgment phase of litigation, where intent is an element of the asserted constitutional offense. When this Court adopted an objective test for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it intended to "purge[ ] qualified immunity doctrine of its subjective components." *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985). This Court "rejected the inquiry into state of mind in favor of a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

The question posed by this case is one that virtually every court of appeals has had to grapple with since *Harlow*: whether, as Justice Scalia wrote in *Halperin v. Kissinger*, 807 F.2d 180, 185 (D.C. Cir. 1986), "the expansive language of *Harlow*, *Forsyth*, and *Davis* is to be taken seriously." That question, unanswered in 1986, remains unanswered today. In this case, the *en banc* court stated, "we note that the Supreme Court has not yet fully

explored a court's inquiry in applying an objective analysis to a claim that depends on the official's state of mind," (citations omitted). App. at C.6. *See also Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990) ("it is by no means clear that the Supreme Court intended this expansive language to preclude *any* inquiry into subjective motivation"); *Poe v. Haydon*, 853 F.2d 418, 431 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) ("this area of the law is murky"); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 648 (10th Cir. 1988) ("The Supreme Court has yet to state how the *Harlow* standard should be applied when the governmental actor's intent is the critical element of the plaintiff's underlying substantive claim," citing *Gutierrez v. Mun. Court*, 838 F.2d 1031, 1050 n. 25 (9th Cir. 1988), *vacated and remanded*, 109 S. Ct. 1736 (1989)); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1439 (D.C. Cir.), *vacated in part*, 817 F.2d 144, *reinstated*, 824 F.2d 1240 (1987) (Starr, J., concurring in part and dissenting in part) ("vexing and sensitive questions" are posed by application of *Harlow*'s objective test to claims "premised on a government official's motive or purpose").

The Seventh Circuit has developed a two pronged analysis to satisfy what it views as the twin inquiries mandated by *Harlow*: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." App. at C.6, quoting *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986). Other courts have refused to eliminate intent from any part of the analysis. *See, e.g., Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 45 (1st Cir. 1988) ("We thus conclude that *Harlow* will not bar inquiry into a defendant's state of mind when the applicable law makes the defendant's state of mind (as distinct from defendant's *knowledge* of the law) an essential element of plaintiff's constitutional claim");

Martin, 812 F.2d at 1433 (when the defendant's intent, unrelated to knowledge of the law, is an essential element of plaintiff's claim, "plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose").

A number of circuits have tried to strike a balance between the "early termination of insubstantial claims"—the announced, but still unrealized aim of *Harlow* (*see Halperin v. Kissinger*, 807 F.2d 180, 186 (D.C. Cir. 1986)—and affording plaintiff some opportunity to prove allegations of unconstitutional motive, *see Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990). For example, the District of Columbia Circuit has developed a heightened pleading standard whereby a plaintiff is required to provide factually specific allegations to support claims of unconstitutional motive. Further, once a defendant makes a showing of the objective legal reasonableness of his conduct, the plaintiff must offer "some direct evidence that the officials' actions were improperly motivated" to avoid pretrial dismissal. *Siegert v. Gilley*, 895 F.2d at 805 (Wald, J. dissenting) (summarizing law). The Tenth Circuit has adopted a similar rule to guide disposition of summary judgment motions in such cases:

> Where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated.

Pueblo, 847 F.2d at 649. By contrast, the Ninth Circuit has flatly held that qualified immunity is not available as a defense in cases involving intentional discrimination. *See Gutierrez*, 838 F.2d at 1051.

Because the courts of appeals have so frequently and with such mixed results sought to solve this difficult problem of how to apply *Harlow* in cases alleging intentional conduct, this Court should grant review.

2. The Seventh Circuit's Refusal To Grant Qualified Immunity Here Contrasts With Four Decisions In Other Circuits Where Immunity Was Granted Even Though The Plaintiff Claimed That Objectively Reasonable Conduct Was Unlawful Due To The Defendant's Motivation.

In the current case, the issue of qualified immunity arose after extensive discovery. Petitioner initially sought summary judgment on the grounds that the respondents had not produced sufficient evidence to raise a genuine issue of fact concerning an illegal motive for petitioner's reorganization of the police department. When that motion was denied, petitioner then argued that the evidence showed his conduct was objectively reasonable. If there was any racial motivation, which petitioner denied, each of the four elements of respondents' own proof pointed to a permissible effort under then existing law to correct a statistical underrepresentation of minorities, specifically blacks, in the exempt ranks of the Chicago Police Department: (1) the evidence that petitioner was playing a "numbers game", as one respondent claims petitioner told him, R. Doc. 73 at par. 65, and (2) that he believed racially conscious reassignments were permissible because of past discrimination in the police department, as his new Executive Assistant allegedly asserted, R. Doc. 69, p. 37, show only a desire to correct a racial imbalance created by past discrimination. (3) The fact that on the day petitioner announced the reorganization he held a chart that indicated the race of one of the newly promoted officers, may tend to prove race consciousness, but objectively, it neither proves nor disproves a then permissible "affir-

mative action" state of mind as opposed to an invidiously discriminatory state of mind. Finally, (4) the allegation that petitioner met with an aide to the Mayor prior to the reorganization and discussed the racial makeup of the exempt ranks as compared with the police department as a whole is evidence of an affirmative action intent, rather than an invidious intent.[2]

It is evident from the respondents' pleadings below that their own theory of their case was that petitioner had engaged in illegal affirmative action. The respondents' own evidence, assumed to be true since they are the parties opposing summary judgment, thus demonstrates petitioner's entitlement to qualified immunity. No member of the *en banc* court disagreed with the dissent's conclusion that a public official could reasonably have believed in 1983, based upon the Seventh Circuit's decision in *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981), that a limited, one-time reorganization of a segment of the workforce to correct a racial imbalance was lawful. App. at C.13. In refusing to look at the objective reasonableness of the petitioner's conduct, the majority of the *en banc* court abandoned this Court's teaching in *Harlow*.

In three different contexts, other circuit courts of appeals have accorded public officials qualified immunity in cases where, like here, the conduct challenged was objec-

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[2] The majority's comment, App. at C.14, n.3, that petitioner did not "have, use or want" figures on the disparity in the exempt ranks, ignores the reliance respondents placed on petitioner's knowledge and use of those statistics to defeat petitioner's motion for summary judgment. See Plaintiffs' Response to Motion for Summary Judgment, R. Doc. 73, at 19.

tively reasonable, but could have been adjudged unconstitutional if the plaintiff was able to prove that it had been undertaken for an improper purpose. In *Lewis v. City of Ft. Collins*, 903 F.2d 752 (10th Cir. 1990), the plaintiff, a Hispanic woman over forty years old, had claimed that her position was eliminated, not for valid business reasons, but because the defendant managers of the City of Ft. Collins wanted to replace older, more senior employees with younger white male employees. *Id.* at 753-54. The defendants responded with evidence designed to show that the reorganization was objectively reasonable for sound business purposes. Because the defendants made a prima facie showing of the objective reasonableness of their conduct, and the plaintiff's evidence was only the circumstantial fact that many of the available higher level positions were eventually filled by white males, the court refused to allow a jury to decide whether the conduct was, in fact, illegally motivated. *Id.* at 759. The court also refused to permit the plaintiff to engage in additional discovery to try to unearth more evidence of animus, emphasizing the importance of terminating insubstantial lawsuits as swiftly as possible. *Id.* at 755; 759.

In two cases complaining about illegally motivated conduct undertaken incident to lawful arrests, the First and Eighth Circuits refused to permit inquiry into the true motivation of the public officials. In *Floyd v. Farrell*, 765 F.2d 1 (1st Cir. 1985), a convicted felon out on parole was arrested for driving a stolen car. A warrant had been issued for the arrest of his father for theft of the car, and the plaintiff alleged that he was arrested and then charged with the felony of receipt of stolen property and held on a high bail, in order to induce his father to turn himself in to the police. Certainly, making someone into a hostage by charging him with a felony, rather than a

misdemeanor, for the sole purpose of inducing another to come forward, offends the Constitution. Yet the court, citing *Harlow*, made an "objective analysis of the reasonableness of conduct in light of the facts actually known to the officer." The court went on to state, "Nor are actual motives for conduct to be considered in evaluating a qualified immunity defense. It was to prevent such inquiries that the Supreme Court eliminated from the test for qualified immunity consideration of 'permissible intentions.' " 765 F.2d at 6, citing *Harlow*, 457 U.S. at 815-19.

Similarly, in *Russell v. Hardin*, 879 F.2d 417 (8th Cir. 1989), the plaintiff had alleged that officers had a dual motive when they searched his premises and seized some silver: plaintiff agreed that the officers had a lawful reason to search for a fugitive, but asserted that at least one of them had an improper motive of illegally seizing the silver for the Internal Revenue Service, which he knew to be interested in the plaintiff but which he also knew had not yet requested any search of the premises for assets. *Id.* at 418. Because the search was objectively reasonable, the court granted the defendants qualified immunity, refusing to look beyond the objective reasonableness at any other asserted motivation. *Id.* at 421.

Finally, in *Halperin v. Kissinger*, 807 F.2d 180, the court granted qualified immunity to defendants for their unauthorized wiretap of the plaintiff because their conduct, viewed objectively, was reasonable if undertaken for national security reasons. The plaintiff was not allowed to examine the defendants' real motivation, to attempt to prove they were motivated by something other than concern for the national security. *Id.* at 188. In deciding to foreclose an inquiry into real motivation that might disclose a constitutional violation, the court satisfied the plain wording of *Harlow*, *Forsyth* and *Davis*, at the same

time following the well beaten path establishing a "special rule for national security matters". *Id.* at 187.

Whatever the factual differences between the present case and these four cases, the principle of qualified immunity recognized in *Harlow* should control: a court should terminate litigation once a showing of objective reasonableness has been made, even when a plaintiff seeks to continue to try to prove an illegal motive that would transform otherwise lawful conduct into a constitutional violation.

Granting petitioner qualified immunity on an objective basis in this case will not deprive many aggrieved plaintiffs of the means to redress constitutional deprivations. In those situations where the defendant's conduct can be shown to be objectively reasonable in light of existing law, qualified immunity should protect a public official from the burden of litigating over his subjective intent. In the area of deliberately discriminatory actions motivated by racial animus, an employee often claims that an act lawful on its face was undertaken for a hidden discriminatory purpose, in violation of existing law. Employment decisions giving rise to allegations of racial discrimination should not receive a wholesale exemption from the doctrine of qualified immunity. That is particularly true of decisions, like the one challenged here, that were undertaken during the years that affirmative action law has been in almost constant flux, and hence are readily viewed as reasonable under existing law. It is precisely to shield public officials from liability for public actions they have taken when the law was unsettled that qualified immunity was developed.

Because this case presents this Court with an opportunity to settle a recurring issue of great difficulty and

importance to public officials, and, in so doing, give guidance to the circuits that are struggling to apply *Harlow* in the many areas of civil rights law where intent is an element of the offense,[3] this petition should be granted.

II.

THE SEVENTH CIRCUIT'S RELIANCE UPON DICTUM AS HAVING CLEARLY ESTABLISHED LAW IS INCONSISTENT WITH THE RULE THAT PUBLIC OFFICIALS SHOULD NOT BE LIABLE FOR DAMAGES UNTIL THE LEGAL CONTOURS OF THE RIGHT ASSERTEDLY VIOLATED ARE SUFFICIENTLY CLEAR THAT A REASONABLE OFFICIAL WOULD UNDERSTAND HE IS VIOLATING THAT RIGHT.

A majority of the Seventh Circuit, sitting *en banc*, denied petitioner qualified immunity from respondents' claim

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[3] A forbidden intent frequently transforms otherwise lawful conduct into a constitutional violation in a number of different situations, *see, e.g., City of Canton v. Harris*, 109 S. Ct. 1197, 1204 (1989) (a municipality is liable under § 1983 for failure to train police officers only if "failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact"); *Arizona v. Youngblood*, 488 U.S. 51 (1988) (Failure to preserve exculpatory evidence in a criminal prosecution is unconstitutional only if done in bad faith); *Daniels v. Williams*, 474 U.S. 327, 348 (1986) ("The Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss or injury to life, liberty, or property"); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (otherwise constitutional firing of employee becomes unconstitutional if motivated by employee's exercise of First Amendment rights); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976) (failure to provide medical care for prisoners is a constitutional violation only if it amounts to deliberate indifference to the prisoner's serious medical needs); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (private conspiracies are actionable under § 1985(3) only if motivated by invidiously discriminatory class-based animus).

that he had retaliated against them for having filed this lawsuit, in violation of a right to be free from such retaliation, which respondents claim is found in the first amendment. In so doing, the majority concluded that petitioner had violated respondent' clearly established first amendment rights. The majority affirmed the reasoning of the district court that a 1984 decision, *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984), had clearly established in the Seventh Circuit "that a lawsuit raising a matter of public concern was speech protected by the First Amendment, and that retaliation for that conduct would violate First Amendment constitutional rights." App. at D.10. This reasoning seriously undermines the protections found in the law of qualified immunity.

Altman drew on this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), which announced a balancing test to judge when an employee's free speech was entitled to protection notwithstanding its actual or potential disruption to the workplace. Where the employee's activity was in furtherance of an issue of "public concern," the balance would tip toward the employee. In *Connick* the employee's activity was circulating a petition, not filing a lawsuit, as here. *Altman* was the first opportunity the Seventh Circuit had, after *Connick*, to consider the first amendment dimensions of a lawsuit brought by a disgruntled employee. In *Altman*, the court did not *hold* that a lawsuit raising a matter of public concern was speech protected by the first amendment. Rather, the court there held that the particular lawsuit it was reviewing did not involve a matter of public concern, but was a private personnel matter, and so was not protected. 734 F.2d at 1244. The *Altman* court's statement that the "plaintiff cannot be disciplined consistently with the due process clause in retaliation for the exercise of his first amendment rights,"

id. at 1243, was classic "dictum," in that it went beyond the facts of the case before the court. Such judicial remarks, as Chief Justice Marshall said, "may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821). *Accord Wright v. United States*, 302 U.S. 583, 594 (1938). Because dictum is not "law," and does not control future cases, *a fortiorari* it is not "clearly established" law that puts a public official on notice that his conduct may be unconstitutional.

The district court understood that *Altman* was not precedent for the proposition that the filing of a lawsuit to vindicate private employment grievances was protected by the first amendment:

> I could not find a case clearly articulating that the filing of a lawsuit was an action protected by the First Amendment and, in fact, I think the case law is that the mere filing of an action is not protected by the First Amendment. You must look to the subject matter of the lawsuit in determining whether it's a matter of public concern or a matter of private concern.
>
> Of course, the Altman case, the decision in the Seventh Circuit, was that in that case, which was filed by a police officer, and the allegation was retaliation for encouraging the filing of a lawsuit, that the matter was of private concern, and so, consequently, did not allow for First Amendment constitutional protection.

App. at D.9-D.10.

Altman simply did not and could not settle the question for the Seventh Circuit of what lawsuits are protected by the first amendment. The Seventh Circuit's discussion

of the same issue in a subsequent case, *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412 (7th Cir. 1988), demonstrates how unsettled *Altman* left the law. There the court discussed at some length the proposition that not every lawsuit is protected by the first amendment, and cited *Altman* to demonstrate its point. *Id.* at 419. Indeed, in *Yatvin* the court took exception to the apparently "flat rule" stated by the Eighth Circuit that "the 'filing of an EEOC charge and a civil rights lawsuit are activities protected by the first amendment.' " *Id.*, quoting *Greenwood v. Ross*, 778 F.2d 448, 457 (8th Cir. 1985). Instead, the court, "reluctant to federalize the law of retaliatory dismissal," *id.* at 420, suggested that the first amendment status of a lawsuit can only be determined on a case by case basis: "the First Amendment status of a lawsuit depends on the particulars of the suit rather than on the bare assertion that every lawsuit (or even just every discrimination suit) is a form of speech or petition encompassed by the amendment." *Id.*

Far from being readily apparent that the petitioner's alleged conduct violated respondents' constitutional rights, the particular contours of this case were so unclear that the panel first reviewing the case declared the respondents had not even stated a constitutional claim. It was only after the full court reheard the case *en banc* that seven judges concluded the first amendment was implicated; four judges still believed it was not. App. at C.30-C.32. Where reasonable public officials can disagree about the lawfulness of an action, immunity should be granted. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See also Butler v. McKellar*, 110 S. Ct. 1212, 1217 (1990) (the fact that circuit judges take differing positions is "evidence" that a given outcome is "susceptible to debate among reasonable minds").

The Seventh Circuit's use of dictum to "clearly establish" law is not only in error, but gravely endangers the principle enunciated in *Anderson v. Creighton*, 483 U.S. 635 (1987), that:

> the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . in the light of preexisting law the unlawfulness must be apparent.

Id. at 639. Here, the *Altman* court had decided nothing more than that the filing of a lawsuit that did not raise matters of public concern was unprotected; there could be no guarantee that the court would find there to be protection when different facts presented themselves. If public officials are left to speculate about the implications of prior decisions if extended to fact patterns not before the court, then the protections offered by the doctrine of qualified immunity are largely eviscerated. Indeed, that is why this Court, in *Anderson*, insisted that a right must be defined with sufficient specificity to clearly apply to the concrete facts before the court before it can be said to be "clearly established." *See* 483 U.S. at 639. *Altman* did not present the facts of this case, and in fact the *Altman* court acknowledged that this court had not yet decided whether the filing of a lawsuit has first amendment protection. That issue remains unsettled today.

Surely the law in this area is not "clearly established." To require public officials to follow each dictum, logical implication or negative pregnant contained in the decisions of not only this court but each circuit is to confine qualified immunity to a far greater extent than *Anderson* permits. For this reason, other circuit courts of appeals have stated that dictum cannot clearly establish the law for

qualified immunity purposes. *See e.g., Donta v. Hooper*, 774 F.2d 721 (6th Cir. 1985); *Zweibon v. Mitchell*, 720 F.2d 162, 172 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 880 (1984) ("clearly establish" does not equate with "clearly foreshadowed"). Here the Seventh Circuit departed from the well-reasoned law in those circuits.

This court should grant review of this case in order to clarify that dictum cannot clearly establish constitutional law; where the law is unsettled and reasonable jurists disagree on the application of dictum to a given set of facts, the public official is entitled to qualified immunity.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to the Seventh Circuit to review this case.

Respectfully submitted,

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